No. 12,558

IN THE

United States Court of Appeals

For the Ninth Circuit

EDDIE MATTOX and BERTHA MATTOX,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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NATURE OF THE CASE AND OF THE APPEAL.

The record before this United States Court of Appeals, on this appeal, brings up and presents for review a judgment that gives judgment in favor of the plaintiff and against the defendants in an action commenced on May 9, 1949, by the filing of the original complaint in the office of the clerk of the District Court of the United States for the Northern District of California, Southern Division, for injunctive relief, restitution and damages for alleged violation of Rent Regulations on the part of the defendants, as landlords, in demanding and receiving rentals from various tenants (twelve in number) in excess of the maximum

rent permitted by said regulations, over a period of time from November 24, 1947 to May 9, 1949, the date of the filing of said complaint. (R. 2-8.)

Jurisdiction of the Court below was invoked by the plaintiff, and the Court entertained and assumed jurisdiction of the subject matter, under provisions of Secs. 205, 206(b) and 206(c) of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1949 (50 U.S.C.A. Appendix, Sec. 1881 et seq.). Subsequent to the filing of the original complaint, and after the defendants had filed an answer to said complaint (R. 9-10), the plaintiff, pursuant to the requirement of the Rules of Civil Procedure, Rule 15(a), on August 19, 1949, moved the Court "to amend the complaint on file herein", upon noticed motion (R. 19), and on the hearing of the motion it was by the Court ordered that plaintiff's motion "to amend complaint" be granted. (R. 19-20).

On September 8, 1949, plaintiff filed an amended complaint, which contains four counts, two based on the amended Section 206 (b) of the Housing and Rent Act of 1947 for injunctive relief, including an order for restitution of alleged excessively collected rentals, limited to the period of one year prior to the filing of the complaint, and the others based on the amended Section 205 of the said Act, for judgment for triple damages in respect of such excessive rent collections within one year before the filing of the complaint, but diminished by the amount of restitution which may be ordered, in respect of rentals collected during the like period.

Defendants having filed an answer to the amended complaint, wherein they allege, in further answer and as a separate and affirmative defense, to each of the four counts of the complaint, that the count fails to state any facts or acts or claim against them, or either of them, upon which relief can be granted. (Par. 6 (R. 34), Par. 4 (R. 35), Par. 3 (R. 36), Par. 3 (R. 37).)

The action went to trial on December 9, 1949, and was tried to the Court, without a jury, upon the issues joined by the "Amended Complaint" and the answer thereto; and upon the conclusion of the trial, the Court gave and rendered its decision in the form of findings of fact and conclusions of law (R. 38-43), by which it, *inter alia,* substantially found: The premises described in the amended complaint were controlled housing accommodation within the meaning of the Housing and Rent Act of 1947, as amended, and Rent Regulations for the enforcement thereof, and that the defendants in violation of provisions of said Act, and said Regulations, demanded, accepted and received from each and every one of the twelve tenants, as set forth in Exhibits "A" and "B" attached to plaintiff's amended complaint, amounts in excess of the legal, maximum rents as set forth in said exhibits, to the total sum of $6,761.80. (R. 39-41.)

The Court specially found that the violations of the Act and the Regulations committed by the defendants were neither willful nor the result from the failure of the said defendants to take practicable precautions. (R. 41.)

Further findings of the Court (following the allegations of Counts III and IV of the Amended Complaint) are:

"IV.

"That on or about June 2, 1949, Henry A. Cross, the duly appointed Director for the San Francisco Bay Defense Area, pursuant to the authority granted him under the Housing and Rent Act of 1947, as amended, and the regulations issued pursuant thereto, did under Sections 825.5(c)(3) and 825.5(b) of said Rent Regulations, issue orders reducing the maximum rent for those certain housing accommodations known as Numbers 1805, 1805A, 1811, 1813A, 1815, 1817, 1819, and 1823 Ellis Street, San Francisco, California, and that by the terms of the said orders the defendants and each of them were required to refund to the tenants of the aforesaid housing accommodations any rent collected from the effective date of said orders, in excess of the amount provided in said orders within 30 days from the date of the said orders.

"V.

"That Defendants, Eddie Mattox and Bertha Mattox and each of them were in violation of the orders referred to in Finding No. IV above, in that they have wholly failed either within the 30 days required under the orders referred to in Finding No. IV above, or at any time or at all, to make the refunds required by the said orders.

"VI.

"That the orders of the San Francisco Bay Defense Rental Area referred to in Finding IV

above, were duly served in accordance with the regulations issued pursuant to the Housing and Rent Act of 1947, as amended, upon defendants Eddie Mattox and Bertha Mattox."

From the findings of fact, the Court concluded: That it had jurisdiction of the subject matter of the action and of the parties under the amended Sections 205, 206(b) and 206(c), of the Housing and Rent Act of 1947; that plaintiff was entitled to a permanent injunction as prayed for in its amended complaint; and that plaintiff, on account of the aforesaid violations, is entitled to judgment requiring and directing defendants to forthwith refund to the plaintiff, in behalf of the tenants named in the aforesaid exhibits "A" and "B", the sums set forth as overcharges opposite their names in said exhibits, being the total sum of $6,761.50, or in the alternative, to the Treasurer of the United States, and directed that judgment be entered in accordance therewith. (R. 42-43).

Judgment, based upon the findings of fact and conclusions of law, was entered in the Court below on March 8, 1950. (R. 46). From that Judgment the appellants (defendants below) have appealed and prosecute this appeal to this United States Court of Appeals for the Ninth Circuit. Notice of Appeal was filed on April 25, 1950, (R. 47), within the time allowed by Rules of Civil Procedure, Rule 73(a), where the United States of America is a party to the action, and jurisdiction of the said cause, and of said appeal, is conferred to this Court by Section 1291 of the Judicial Code (28 U.S.C.A. Sec. 1291).

Parenthetically, we deem it not amiss to here remark that the appellee (plaintiff below), without having filed any notice of appeal pursuant to the Rules of Civil Procedure, Rules 73(a), and 73(b), has appeared in this Court to prosecute an appeal from the judgment of the Court below, by way of a cross-appeal, and has filed a brief as such cross-appellant on the assumed grounds and theory advanced in said brief that the Court below erred (A) in denying any statutory damages pursuant to Section 205 of the Act; and (B) in failing to enter a Judgment for three times the amount of the overcharge, because the defendants neither pleaded nor proved the lack of willfulness and the taking of practicable precautions as provided in Section 205 of the Act. (Cr.-App. Br. 6). Cross-appellant closes its brief in chief with a short and streamlined suggestion that this Court should affirm the judgment of the Court below, and remand the case with directions to enter a judgment for either the amount of the overcharges, or for treble that amount. (Cr.-App. Br. 19). This notwithstanding the restitution order for the amount of the overcharges and the finding of the Court below, as above stated, that the acts of the defendants complained of "were neither willful nor did they result from the failure of said defendants to take practicable precautions".

COMMENT AND AUTHORITIES.

As previously indicated, the case presents some peculiar phases and introduces some exceedingly novel

innovations. The questions raised on the record, although confined within sufficient definite limits, touch a wider field of law at many points and are, as we find them, largely affected by numerous decisions and statutes, some of which are still in plastic state*—to say nothing of the general principles of common law, and of equity—that the task of presenting anything like a concise, logical brief on the case has not been a light one. In order that this Court may understand the grounds of error which are made the basis of this appeal, and as conducive to a clear presentation and explanation of the points relied upon by them for a reversal of the judgment from which the appeal was taken, and to a lucid exposition of the relevancy, pertinency, force and importance of such points in their bearing upon the questions raised upon the record, and on which the decision of the cause depends, the following narrative of matters vital to the appeal, as they appear from the record, is respectfully submitted.

The record discloses the following irrefutable facts and circumstances which form a true approach to the questions involved. The action was commenced on May 9, 1949. Plaintiff's authority to sue and the relief sought by it arises under amended Sections 205

*See *U. S. v. Gianoulis,* 183 F. (2d) 378, with respect to the retroactive operation of amended Section 205 of the Housing & Rent Act of 1947 (50 U.S.C.A. Appendix, Sec. 1895) effective April 1, 1949, conferring authority on the United States to sue, where the Court said:

> "Although we can find no reported decisions on the point by any court of appeals, District Courts, both within and without this Circuit, have had frequent occasion to rule on this point. These decisions, however, are in sharp conflict."

and 206(b) of the Housing and Rent Act of 1947. (50 U.S.C.A. Appendix, Secs. 1895 and 1896.)

The original complaint filed in the action contained two counts. The gist of the first count was that defendants have engaged in acts and practices which constitute violations of Section 206(a) of the Housing and Rent Act of 1947, as amended, in that since July 1, 1947 defendants demanded and received from tenants occupying their premises, rentals in excess of the lawful rental permitted by the Rent Regulations. The gist of the other count was that since July 1, 1947, and within one year prior to the date of the commencement of the action (exclusive of the 30-day period immediately prior to the date of the commencement of the action) the defendants demanded and received from tenants occupying their premises in excess of the lawful rental permitted by the Rent Regulations, and that more than thirty days have elapsed since the occurrence of the violation alleged, and the persons from whom such excess rentals were demanded, accepted or received, have not instituted any action under amended Section 205 of the Housing and Rent Act of 1947 for said violations. (R. 2-4.)

Nowhere in the complaint was it alleged that at the time of the commencement of the action, nor does it appear therefrom, that the defendants were in default of obedience to any refund orders or order issued by the Area Rent Director, or any public authority, commanding refund of the excessive rentals alleged to have been collected.

On September 8, 1949, some four months after the commencement of the action, the plaintiff filed its "Amended Complaint", having been granted leave by order of Court below to file an "Amended Complaint", which contains four counts, the first two (Counts I and II) being the same as the two counts in the original complaint. (R. 2-4, 20-22.)

Each of these counts, like their predecessors, is utterly destitute of any allegation that at the time of the commencement of the action the defendants were in default of obedience to any refund orders or order that had been issued by the Area Rent Director, or other public authority, commanding refund of the excessive rentals alleged to have been collected. These two counts are directed at excessive rentals alleged to have been collected from four tenants named in Exhibit "A" attached to the amended complaint. The other two counts (Counts III and IV) of the "Amended Complaint" are based entirely upon retroactive refund orders issued by the local Area Rent Director on June 2, 1949, more than three weeks after the commencement of the action, reducing the maximum rent for the premises involved, and requiring the defendants to refund to the tenants any rent collected from the effective dates of said retroactive orders, in excess of the amount provided therein, within thirty (30) days of the date of said orders. The gist or gravamen of these counts is that more than thirty days have passed since the date of the said orders and the defendants have wholly failed to make any or all of the refunds so ordered. (R. 23-24.)

It is to be noted that Counts III and IV of the amended complaint, taken together, do no more than undertake to state a single cause of action. Both of them relate to a group of eight tenants named in Schedule "B" attached to the amended complaint.

The foregoing facts and circumstances, especially the belated efforts on the part of the plaintiff to create and bring before the Court a cause of action which admittedly was non-existent at the time of the commencement of the action, disclosed by its "Amended Complaint", and the findings of fact and conclusions of law based thereon, standing alone and exclusive of the binding admissions of plaintiff's counsel on the trial in bringing the attention of the Court below to the doctrine laid down by the Supreme Court in the case of *Woods v. Stone* (1948), 333 U.S. 472, hereinafter set forth, sufficiently speak for themselves; and, with all due respect to the learned judge presiding on the trial in the Court below, we are absolutely at a loss to conceive how the judgment appealed from can stand or be otherwise than reversed.

The questions and propositions of law in this case thus are substantially as follows:

(1) Whether the Court erred in concluding that it had jurisdiction of the subject matter of the action under the amended Sections 205, 206(b) and 206(c) of the Housing and Rent Act of 1947;

(2) Whether the Court below had jurisdiction or authority to enter such judgment upon the facts and amended complaint;

(3) Whether the amended complaint, and each of the several counts set up therein fails to state any facts or acts or claim against the defendants upon which relief could be granted in this action under amended Section 205 or Section 206(b) of the Housing and Rent Act of 1947 (50 U.S.C.A. Appendix, Secs. 1895 and 1896);

(4) Do the findings sustain the conclusions and judgment based thereon;

(5) Did the Court err in failing to make separate findings as to matters which are peculiar to each of the several counts of the amended complaint?

To avoid unnecessary and uncommendable repetition, we shall consider the first three propositions together; they are, as will presently be seen, inter-related, and in the main the authorities applicable to one are applicable to the others. Approaching the matter at hand, we shall now proceed to show, if not, indeed, demonstrate, that:

(1) *The Court erred in concluding that it had jurisdiction of the subject matter of the action under the amended Sections 205, 206(b) and 206(c) of the Housing and Rent Act of 1947;*

(2) *There was no jurisdiction or authority upon the part of the Court below to enter such judgment upon the facts and amended complaint;*

(3) *The amended complaint, and each of the several counts set up therein fails to state any facts or*

acts or claim against the defendants upon which relief could be granted in this action under amended Section 205 or Section 206(b) of the Housing and Rent Act of 1947 (50 U.S.C.A. Appendix, Secs. 1895 and 1896).

It is definitely established that the mere demanding, accepting or receiving from tenants rentals in excess of the maximum rental permitted under the Act and Regulations, standing alone, and in the absence of any failure of the landlord to comply with an order commanding refund of the excess rentals collected does not create any obligation or duty on his part, or give rise to any action, legal or equitable, under the statute. And so says plaintiff's counsel.

Inquiring students in the law recall the unexpected and anxious result produced by throwing the squib in the celebrated squib case. But mark the novel result here. At the outset of the trial, so the record shows, plaintiff's counsel brought to the attention of the Court the eight retroactive refund orders set out in Counts III and IV of the Amended Complaint issued on June 2, 1949, and which "materially changes the aspect of the case", and pointed out that these two counts charge violation of the alleged retroactive refund orders and cited to the Court, and quoted from the case of *Woods v. Stone,* 333 U.S. 472, 68 S. Ct. 624, "which was decided March 15, 1948 and is directly on this point". (R. 50-52.) This admission runs like a marking cord through the whole warp and woof of the case. Because that case holds that "Default in obedience to requirement of refund gives rise

to the cause of action sued upon herein". It was in order that the full significance of this large admission and controlling decision should stand out in bold relief that we have heretofore set forth at length and substance the averments of the complaint and findings at the expense of brevity.

Thus it is the violation which occurred when the refund order is not obeyed within the required time that gives rise to the cause of action and authorizes the suit. "There can be no recovery of penalties or damages in the absence of a refund order." *Penner v. Geller,* 87 N.Y.S. (2d) 249, at 350, 193 Misc. 821, citing *Woods v. Stone,* 333 U.S. 472.

In reversing the judgment of the Court below on the single point "That the one-year statute of limitation began to run on the date that a duty to refund was breached", the Court said, in *Woods v. Stone* (333 U.S. 472):

> "We think it clear that default in disobedience to requirement of refund gives rise to the cause of action sued upon herein."

The Court further said:

> "In short, the cause of action here at issue can be created only by statute, not by regulation. The question is not one of validity of the regulations, but of statutory interpretation, not an interpretation to determine whether the statute authorized the regulations but whether it authorizes the suit."

For additional cases applying the rule that violation of a refund order is an indispensable prerequisite to

the bringing of an action, see: *Ramseyer v. Contestabile* (D.C. Pa. 1949), 86 F. Supp. 104; *Gaglione v. Katz* (1950), 7 N.J. Super. A.D. 151, 72 A. (2d) 381.

It hardly requires the test of a cold judicial touchstone to determine that the Court below had no jurisdiction to try and determine this cause. No violation of a refund order at the time of the commencement of this action had occurred, or is charged, because there admittedly was no such order then issued. On the other hand, the plaintiff is bound and estopped by the allegations of its complaint and the admission of its counsel from asserting to the contrary. Admissions of attorneys authorized to act in legal proceedings estop their principals therein. (*Atchison, T. & S. F. R. Co. v. Sullivan,* 173 F. 456, 97 C.C.A. 1.)

The Court below, on the other hand, had no jurisdiction or authority to entertain and assume jurisdiction of this cause. The foregoing requirement being jurisdictional, it must be established by the person invoking the jurisdiction of the Court. Wrongs, either in civil or criminal law are not based on prognostications. Jurisdiction must appear by pleadings or record. (*Realty Holding Co. v. Donaldson,* 294 F. 541; *New England T. Co. v. Meyers* (D.C. Mass.), 15 F. Supp. 807.) The jurisdiction of the Federal Court is to be determined by the allegations of the complaint. (*Moore v. Chesapeake & O. R. Co,* 291 U.S. 205; *Southern Pacific R. Co. v. Query* (D.C.-S.C.), 21 F. (2d) 333; *Palestine Tel. Co. v. Palestine* (D.C. Tex.), 1 F. (2d) 349.) And facts showing jurisdiction must be pleaded. (*Abbott v. Eastern Mass. Str. Co.* (C.C.A.

1), 19 F. (2d) 463; *Denaro v. Maryland Baking Co.* (C.C.A. 1), 35 F. (2d) 351; *Cole v. Blankenship* (C.C.A. 4), 30 F. (2d) 211; *Ocean Industries, Inc. v. Green* (D.C. Cal.), 15 F. (2d) 862.) The allegations of complaint control question of jurisdiction. (*Hammerstein v. Toy Nat'l Bank* (C.C.A. 8), 81 F. (2d) 628.) It should set forth the facts and not merely conclusions as to jurisdiction. (*Crawford Co. T. & S. Bank v. Crawford Co.* (C.C.A. 8), 66 F. (2d) 791, cert. den. 291 U.S. 664.)

It is equally well established that the jurisdiction of the Federal Court is always in issue, whether raised by the parties or not. (*Maryland Cas. Co. v. Glassell-Taylor & Robinson* (C.C.A. 5), 156 F. (2d) 519, 522. See also *Windholz v. Everett* (C.C.A. 4), 74 F. (2d) 834.) It is presumed to be without jurisdiction until the contrary is made to affirmatively appear. (*Young v. Main* (C.C.A. 8), 72 F. (2d) 640. See also *National Lead Co. v. Chicago R.L. Bd.* (D.C. Ill.), 8 F. Supp. 820.)

In the present case, it is quite plain that the Court below lacked jurisdiction of the subject matter set up and undertaken to be pleaded as a cause of action in each of the separate counts of the amended complaint and should have dismissed the action for lack of jurisdiction of the subject matter, even on its own motion, on the grounds set up and pleaded as a defense in the answer to the amended complaint, and each count thereof, that it fails to state any facts or acts or claim against defendants upon which relief could be

granted. As to Counts III and IV, such affirmative defense was amplified by the allegation that it in particular fails to state or plead any facts showing that any order referred to therein was at any time prior to the commencement of the action served upon the defendants, or either of them. (Par. 3, R. 36-37.)

The original complaint, filed on May 9, 1949, as has already been pointed out, utterly fails to allege and set forth the jurisdictional facts necessary to authorize the suit—that any violation of an order commanding refund of excessive rentals collected had occurred on the part of the defendants, at or prior to the time of the commencement of the action. True, the original complaint was superseded by an "Amended Complaint", but the amended complaint goes no farther than the original complaint in alleging, or showing, such jurisdictional facts.

Furthermore, it must be borne in mind that when the plaintiff asked leave to amend, and was granted, by an order of the Court on August 19, 1949, leave to amend the original complaint, neither the proposed amended complaint nor anything indicating the nature or extent of the proposed or contemplated amendments was before the Court (R. 19-20), and until the amended complaint was filed on September 8th, following, remained undisclosed.

The meaning of the term, "amended complaint", and its effect in operation has been well established in our jurisprudence, but seems to have been unheeded, and less understood, by the plaintiff. An "amended

complaint'' is one which corrects faults and errors of a complaint (*Panteleo v. Colt's Patent Fire Arms Mfg. Co.,* 13 F. Supp. 989), or one which is designed to include matters occurring before the filing of the original complaint, but either overlooked or not known at the time. (*Berssenbrugge v. Luce Mfg. Co.,* 30 F. Supp. 101.) It relates back to the date of the original complaint. (Rules of Civ. Proc., Rule 15(c).) The doctrine of relation back in such cases has been applied in numerous cases.

Whatever value, then, the allegations imported into the amended complaint touching the defendants' violation of the orders issued by the Area Rent Director on June 2, 1949, reducing the maximum rent and commanding refund of the amounts set out in the amended complaint, with respect only to 8 of the 12 housing accommodations involved, may have in the present case, in reason and logic, would seem to be as an admission not only that no such violation of an order had occurred, but that no such refund order with respect to any of the defendants' housing accommodations involved had been issued at all, prior to or at the time of the commencement of the action, and as to which fact and the lack of necessary and proper allegations in the complaint to confer jurisdiction the Court below was bound to take notice. It is only the violation which occurs when the refund order is not obeyed within the required time that a cause of action arises. (*Woods v. Stone,* 333 U.S. 472, 68 S. Ct. 624.) And so says the plaintiff itself. (R. 52.) Until the expiration of the time allowed for the making of the

refund, the Court had no jurisdiction of action based on alleged violation of a refund order. See *Mira v. Mishan,* 91 N.Y.S. (2d) 426, aff'd 95 N.Y.S. (2d) 904, 276 App. Div. 1008.

The District Court must take notice of its own lack of jurisdiction. (*Concord C. & C. Co. v. U. S.* (C.C.A. 2), 69 F. (2d) 78.) It was the duty of the Court below to not only assure itself of jurisdiction of the cause (*Miller v. First Service Corp.** (C.C.A. 8), 84 F. (2d) 680), but to take note of facts which point to lack of jurisdiction (*In re Peterson* (D.C. Mich.), 8 F. Supp. 86), and to note lack of jurisdiction, irrespective of action by the parties. (*Woodhouse v. Budwesky* (C.C.A. 4), 70 F. (2d) 61, certiorari den.

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*In *Miller v. First Service Corp.*, 84 F. (2d) 680, 683, it is said:

"We deem it to be fully established that it is the duty of the District Courts to assure themselves of the federal jurisdiction in every case before them, and consent given by the defendant to the exercise of jurisdiction upon subject matter not within the jurisdiction is of no avail. U. S. v. J. M. McCorrick, et al., 56 S. Ct. 829, 80 L. Ed. ....., decided May 18, 1936; Cutler v. Rae, 7 How. 729, 8 How. 615 Append., 12 L. Ed. 890, 1221; Pianta v. H. M. Reich Co. (CCA), 77 F. 2d 888; Barnett v. Mayes (CCA), 43 F. 2d 521; Note 6, 28 USCA sec. 41 (1).

"This duty can and should be enforced by this Court as to all cases coming before it from the District Courts. In the performance of our duty of enforcement we must decide if jurisdiction is an active issue, but we may act upon our own motion. In so acting upon our own motion, we must necessarily be governed by the situation and the record before us. An essential of such situation, because affecting the record brought to us, is the fact that jurisdiction was not an issue in the District Court and was not made an issue in this Court through assignment of error. In this situation we should accept a clear, intelligent finding of jurisdiction by the District Court unless we are satisfied that the record before us affirmatively shows lack of jurisdiction, or arouses grave doubt of jurisdiction. If merely a grave doubt of jurisdiction arises, we may remand to the District Court for hearing and determination upon the question of jurisdiction."

293 U.S. 573.) The Court must dismiss if want of jurisdiction appears. (*Milderman v. Roth* (D.C. Pa.), 9 F. (2d) 637.) All doubts as to jurisdiction must be resolved against it. (*St. Louis etc. R. Co. v. Davis* (C.C. Ark.), 132 F. 629; see also *Whitney v. American Shipbuilding Co.* (D.C. Ohio), 197 Fed. 777.) And it is well established that consent of the parties cannot confer jurisdiction of the subject matter. Nor can lack of jurisdiction be waived. Among the authorities supporting the proposition that jurisdiction cannot be conferred by consent, nor waived by inaction, are: *Demulso Corp. v. Tretolite Co.* (C.C.A. 10), 74 F. (2d) 805; *Mathers & Mathers v. Urschel* (C.C.A. 10), 75 F. (2d) 591; *Ogden Levee Dist. v. K. C. Southern R. Co.* (C.C.A. 8), 39 F. (2d) 884; *Ver Merren v. Sirmyer* (C.C.A. 8), 36 F. (2d) 876; *Matthew v. Coppin* (C.C.A. 9), 32 F. (2d) 100.) Courts will pass on the question of their jurisdiction over the subject matter of their own motion, even though the point is not raised by counsel. (*Rex v. Brunswick-Balke Co.,* 228 U.S. 339, 57 L.Ed. 864, 33 S.C.R. 515; *Powers v. Chesapeake & O. R. Co.,* 169 U.S. 92, 42 L.Ed. 673, 18 S.C.R. 264; *King Iron Bridge & Mfg. Co. v. Otoe Co.,* 120 U.S. 225, 30 L.Ed. 623, 7 S.C.R. 552.)

It is also established, by this Court, that jurisdiction of District Court must be determined by the Appellate Court, though not raised by the parties. (*Southern Pacific Co. v. McAdoo* (C.C.A. 9), 82 F. (2d) 121; *Electro T. P. Corp. v. Strong* (C.C.A. 9), 84 F. (2d) 766.) Anent the subject that jurisdiction may be challenged at any time and may be considered on appeal

whether the question has been raised or not, see *Chicago, B. & Q. R. Co. v. Willard,* 220 U.S. 413; *Rexford v. Brunswick-Balke Co.,* 228 U.S. 339; *Gatch, Tennant & Co. v. Mobile & O. R. Co.* (D.C. Ala.), 59 F. (2d) 217; *Six Wheel Corp. v. Sterling M. T. Co.* (C.C.A. 9), 50 F. (2d) 568; *Miller-Cranshaw Co. v. Colorado M. & E. Co.* (C.C.A. 8), 84 F. (2d) 930; *Robinson v. U. S.* (C.C.A. 5), 84 F. (2d) 885. In the last cited case, it is said that jurisdictional question may be considered, though not raised in the District Court, nor raised in the Appellate Court except by the brief.

In view of what has been shown there can be no need to multiply arguments or cite further authorities on these features of the case, which we do not believe can be made plainer by argument or reasoning.

Before we leave this feature of the case, it may not be amiss to say that the record fails to disclose that any justiciable controversy, claim or right to relief under the amended Sections 205, 206 or 206(b) of the Housing and Rent Act of 1947, existed at the time of the filing of the original complaint in the Court below, as plaintiff had suffered no injury and then had no right which it could enforce legally, and there was no wrong to remedy, and therefore its action in bringing this suit was unauthorized and premature. We maintain (and submit) that the plaintiff's right to sue created by the statute under which the action was brought is subject to and dependent upon the existence of a violation of a refund order which is a condition upon the right created.

The Court should be diligent to see that the law, which is itself reason and common sense, be applied, with the aid of right reason, to produce a reasonable result in the administration of justice. The gravity necessary in the administration of justice to entitle the law to respect necessitates that mere caprice, and practical jokes or legal gymnastics and legerdemain have no part or parcel therein.

What we have said and shown in the preceding portion of this discussion in large measure applies, of course, with equal force to the appellants' contention that—

THE FINDINGS DO NOT SUSTAIN THE CONCLUSIONS AND JUDGMENT BASED THEREON.

Plaintiff, by the judgment herein appealed from, was granted injunctive relief and a restitution order for the sum of $6,761.80, under amended Section 206(b) of the Housing and Rent Act of 1947 (50 U.S.C.A. Appendix, Sec. 1896). Plaintiff's claim to damages, under provisions of amended Sec. 205 of the Act (50 U.S.C.A. Appendix, Sec. 1895) were disallowed.

Without here setting forth in verbatim the language employed by the Court, it is quite manifest that the findings do not sustain the conclusion that the Court has jurisdiction of the subject matter of the action and of the parties under Sections 205, 206(b) and 206(c) of the Housing and Rent Act of 1947, as amended. (R. 42.) Such conclusion of ultimate fact, without any subsidiary findings of fact upon which such con-

clusion is based, certainly was not a compliance with the Federal Rule 52(a). It was made in the absence of any finding as to the jurisdictional fact, without the establishment of which plaintiff was not authorized to bring the suit,—that a violation by the defendants of an order issued by the Area Rent Director commanding refund of excessive rentals collected had occurred at the time of the commencement of the action. It is the complaint, as we have already shown, that determines jurisdiction in the Federal Court. Facts showing jurisdiction must be pleaded, and averments of the complaint is test of jurisdiction.

On the other hand, the Court did find that the defendants, in violation of the aforesaid Act and Regulations did demand, accept and receive from each and every one of the tenants, as set forth in Exhibits "A" and "B" attached to the amended complaint, amounts in excess of the legal maximum rent as set forth in said exhibits, to the total sum of $6,761.80.

The amount in excess of the legal maximum rent set forth in said Exhibit "A" with respect to four housing accommodations and tenants is $2,343.40. As to this amount of overcharges, there is no finding whatever that any order was issued by the Area Rent Director requiring its refund.

The Court also found, in substance, that on or about June 2, 1949, the Area Rent Director issued orders reducing the maximum amount of rent for those certain housing accommodations, eight in number, set out in Exhibit "B" to the amended complaint, command-

ing the defendants to refund to the tenants of said housing accommodations any rent collected from the date of said orders in excess of the amount provided in said orders, within thirty days from the date of said orders and that the defendants were in violation of said orders in that they wholly failed within the thirty days required under the orders to make the refund required by said orders.

An examination of Exhibit "B" of the amended complaint (R. 28) relating to the eight housing accommodations covered by the orders issued on June 2, 1949, reducing the maximum rent, readily discloses that the amount of the excess rent set out in Exhibit "B" to have been collected in excess of the amount of the legal maximum rentals, is only $4,337.40.

Even if it be assumed, arguendo, that these eight refund orders had been violated by the defendants at the time of the commencement of the action, and were the proper subject for consideration by the Court below, in the absence of any refund order with respect to the four housing accommodations set out in Exhibit "A" to the amended complaint, the finding in question could go no further than warranting and supporting a conclusion and judgment for restitution for the said sum of $4,337.40, and not $6,761.80 as the Court concluded.

One thing more merits serious attention and consideration. The Court found that the orders issued by the Area Rent Director on June 2, 1949, after the commencement of the action, were "orders reducing the

maximum rent'' for eight housing accommodations (R. 40); giving the language used by the Court in the finding its ordinary and well recognized meaning, the fact that these orders reduced the maximum rent, as found by the Court, is an implied finding of no less dignity that the rents collected by the defendants up to the time the said orders were issued were the legal maximum rents established under the statute and regulations for those housing accommodations. The finding is one which, as we see it, carries its own evidence along with it.

THE COURT ERRED IN FAILING TO MAKE SEPARATE FINDINGS AS TO MATTERS WHICH ARE PECULIAR TO EACH OF THE SEVERAL COUNTS OF THE COMPLAINT.

The plaintiff's claim for treble damages and claim for injunctive relief and restitution in this action against the defendant landlords under provisions of the amended Housing and Rent Act of 1947 (50 U.S.C.A. Appendix Sec. 1881 et seq.) are distinct causes of action based on separate sections of the statute, even though it is proper to join them in one complaint. (*U. S. v. Strymish* (D.C. Mass.), 86 F. Supp. 999.) Under this statute the United States is authorized, in a proper case, to bring suit for injunction and restitution of rent overcharges, and is also authorized to sue for damages when aggrieved tenant fails to do so within specified time.

Authority to sue for damages is derived from amended Section 205 of the Act (50 U.S.C.A. Ap-

pendix Sec. 1895). It is elemental that an action for damages is an action at law. Authority to bring suit for injunction and restitution of rent charges is derived from amended Section 206(b) of the Act (50 U.S.C.A. Appendix Sec. 1896(b)). It provides for injunctive relief and restitution of rent overcharges, which clearly are remedies equitable in nature. An order of restitution issued under the latter section, in *U. S. v. Cowan's Estate* (D.C. Mass.), 91 F. Supp. 331, was held to be not a judgment for damages or for penalties, but to compel compliance and is a restoration of the *status quo,* which falls within recognized power of a court of equity. So, in *Woods v. Richman* (C.A. Cal., 174 F. (2d) 614, it is said that an order for restitution of illegal rent is proper, as an equitable remedy, to effectuate policy of rent control. Thus in *Porter v. Warner Holding Co.,* 328 U.S. 395, it was held that an action for restitution is different from and independent of an action for damages.

Of the four counts in the amended complaint, two of them, viz.: Counts II and IV, are for the recovery of damages under amended Section 205 of the Act. Each of them relates to recovery of damages with respect to excessive rentals collected from a separately described and different group of tenants from the other. These matters are itemized and listed in two separate exhibits, designated and referred to in the said complaint as Exhibit "A" and Exhibit "B". Only one of these exhibits is referred to and mentioned in each of the several counts. Exhibit "A" lists the names of four tenants and sets forth excessive rentals

collected from them aggregating in amount $2,324.40. (R. 27.) Exhibit "B" lists the names of eight tenants and sets forth excessive rentals collected from them aggregating in amount $4,437.40. (R. 28.)

Under the Federal Rules of Civil Procedure, Rule 52(a)* the trial Court is required to find the facts specifically, and state separately its conclusions of law. This rule has been held to be mandatory. (*Application of Murra,* 166 F. (2d) 165.) In the present case, the Court below in its findings made no special finding as to Counts I and II relating to the excessive rentals collected, as shown in Exhibit "A", and as to which the Area Rent Director issued no refund orders, and which related entirely to a group of four tenants and housing accommodations which was separate and distinct from those set out and shown in Exhibit "B", but throughout its findings tied and blanketed the excessive rentals collected as shown in Exhibit "A" with those shown in Exhibit "B", as to which the Court found belated orders reducing the maximum rent were issued on June 2, 1949. It must be apparent that whatever the rule may be under other circumstances, such findings clearly were not warranted, nor do they accord with the requirement of the Federal Rule that the Court must find the facts specially, hence they were insufficient and improper.

Appellants now digress and turn to a discussion of the matters and propositions undertaken to be set up

*Rule 52: (a) "In all actions tried upon the facts without a jury, or with an advisory jury, the Court shall find the facts specially, and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. * * *"

and presented in the brief of the cross-appellant, United States of America, herein.

APPELLANTS' REPLY TO CROSS-APPELLANT'S BRIEF.

The brief of cross-appellant may fairly be said to show, as will presently be seen, that it is true in forensic strife, as in other human affairs, all things are possible, or at least, by cross-appellant's counsel, happily considered possible. Speaking generally, its whole structure, substance and gist are made up of a loose application of principles and general reproaches, based on a substratum of real facts underlying and disconnected from material, controlling facts and circumstances disclosed by the record, the net result of which is a series of points, arguments and theories which are untenable.

Broadly, as a main proposition, it is contended, by cross-appellant's aggregation of veteran counsel, that the Court below erred in failing to enter a judgment for any statutory damages, and, likewise, in failing to enter a judgment for three times the amount of the overcharges. This contention is presented, with comment and authorities, under two headings, viz.: (A) The Court below erred in denying any statutory damages pursuant to Section 205 of the Act, and (B) the Court below also erred in failing to enter a judgment for three times the amount of the overcharge because the defendants neither pleaded nor proved the lack of willfulness and the taking of practicable precautions as provided in Section 205 of the Act. (Br. 6.)

And in a short, concluding paragraph, after quoting at length the finding of the Court below to the effect that the violation of the Act and regulations issued pursuant thereto, committed by the defendants "were neither willful nor did they result from the failure of the said defendants to take practicable precautions", and after strenuously urging that such finding has no support whatever in the record, and is "clearly erroneous", and, after asking this Court to reverse that finding (R. 9), cross-appellant's counsel suggest and submit that the **judgment of the Court below be affirmed** by this Court and the case remanded to the Court below with directions to enter a judgment for either the amount of the overcharges or for treble that amount. This is a most amazing proposition.

As a basis for such contentions and arguments made thereon to the effect that this case is one where it was incumbent upon the defendants to plead and prove, in mitigation of damages, that the overcharges were neither willful nor the result of failure to take practicable precautions, cross-appellant's counsel state and represent to this Court (Br. p. 10), that "two-thirds of the violations were based on orders decreasing rent", and that all of said orders were effective prior to issuance (if such can be conceived) and "therefore required refund". From this premise, it is argued that since the defendants failed to oppose the issuance of the order or to appeal after its issuance, their failure to comply with its terms to refund is necessarily a knowing, and deliberate overcharge.

We have carefully examined and analyzed the cases in the brief of cross-appellant, and do not find that any of them in terms apply to the proposition in this case to which they are cited, as we view it, although the general principles reviewed tend to support the naked legal points which cross-appellant is so endeavoring to raise, as distinguished and apart from the real jurisdictional and legal issues raised on the record before the Court herein.

Application of the right legal rules to the wrong facts renders a result, of course, as erroneous as the application of the wrong rule to the right facts. In the present case, it would seem the cross-appellant does both.

The only grants of jurisdiction to Federal District Courts in the amended Housing and Rent Act of 1947, (50 U.S.C.A. Appendix, secs. 1881 *et seq.*) are in Section 1895 of the Act relating to recovery of damages and in subdivision (b) of Sec. 1896 of the Act relating to enforcement. Cross-appellant concedes that an action of restitution is independent of an action for damages. (Br. 8.)

The amended Act of 1947 can be searched from beginning to end and nothing can be found therein which confers any power upon the Court in granting an order for restitution of illegally collected rents, to either double or treble the amount thus ordered to be refunded, as requiring the Court, as ancillary to the exercise of its benign equity powers, to give judgment for damages for the amount of rents found to be illegally collected within the one year prior to the

institution of the action, and for which it has ordered restitution. The remedies of injunction and restitution with respect to overcharges by landlord for rental accommodations are equitable remedies addressed to the discretion of the Court. (*U. S. v. Mashburn* (D.C. Ark.), 85 F. Supp. 968; *Creedon v. Polis* (D.C. Pa.), 7 F.R.D. 652. See also *Woods v. Kooker,* 83 F. Supp. 362; *Creedon v. Seele,* 75 F. Supp. 767.)

Especially must this be true when the action is considered as one in "equity" which does not incline to introduce new and unusual things; although it desires the spoiled, the deceived and the wronged above all things, to have restitution where the facts and circumstances call for such relief.

It is quite obvious that counsel are unaware that equity looks to the substance and not to the shadow, to the spirit, and not the letter. It seeks justice rather than technicality; truth, rather than evasion; common sense rather than quibbling. See *State v. Tyler Co. State Bank* (Tex. Com. App.), 282 S.W. 211, 45 A.L.R. 1453.

Equity, as spoken of in the law, and as is synonymous with conscience, does not administer the statute by the varying springing whims and caprices, or the unregulated discretion of the individual chancellor in each case. Conscience is administered by fixed principles. It is founded on the law and never contravenes it.

"Equity is bound by rules of law; it is not above the law, it cannot controvert the law." (*Floyd v.*

Davis, 98 Cal. 601, 33 P. 746.) *Equitas sequitur legum* is a familiar maxim.

In the case of *Jackson v. Woods* (C.A. Tex., 1950), 182 F. (2d) 338, it is said that, where the rent charges are proven, judgment should be rendered against landlord for not less than amount of such overcharges, and relief may be either by way of restitution in appropriate circumstances, **or by a judgment for damages under a law action,** but the amount awarded by way of restitution is within the sound discretion of the Court in equity. And in *Woods v. Schwartz* (D.C. Pa., 1950), 88 F. Supp. 42, on the other hand, and to the same effect, it is said that the United States is entitled to damages for rental overcharge for housing accommodations in defense rental areas during month within year before institution of the suit therefor, in the actual amount of such overcharge, with treble damages in absence of proof of landlord's willfulness and failure to exercise practicable precaution, but **it is not entitled to order for restitution of such amount to tenants.**

Next, it seems quite vain for cross-appellant's learned counsel to argue the merits of the case on the facts, as they now and then do in its brief. What statutory damages the Court below erred in failing to enter judgment for, or the amount thereof, does not appear within the covers of cross-appellant's brief. As previously indicated, the entire contention and argument seems to rest upon the statement in the brief that two-thirds of the violations here were based upon orders decreasing rent—Plaintiff's Exhibits 5 to 12—

none of which orders are set out in the record before the Court.

And it is to be noted, that while cross-appellant's counsel rely upon and refer to these orders which they state were all effective on dates prior to issuance, they have, *ex industria,* refrained from setting out the dates the orders were issued. This significant circumstance, perhaps, was due to abundant caution, arising from what is said in the extract quoted from the case of *Woods v. Haydell,* 178 F. (2d) 914, relied upon by cross-appellant. In that case, as appears from the extract quoted from the opinion (Br. 8) the rule that "whenever it is determined that there has been an overcharge, damages for the full amount of such overcharges should be awarded". Under the circumstances present here, the amount of overcharges for which judgment should be given, is limited to overcharges found to have occurred *after* the reduction order. Otherwise put, in a case such as the present one, where the record shows that the reduction orders were issued on June 2, 1949, the judgment should have been for all overcharges found to have occurred *after* the reduction orders of June 2, 1949, even though the overcharges were nonwillful and not caused by the failure on the part of the landlord to exercise due care.

It hardly seems necessary to add that the position assumed by cross-appellant is clearly fallacious and incapable of being maintained. First, no such overcharges were pleaded or proven in the present case, but only overcharges which had occurred prior to the issuance of the rent reduction orders which the Court

found were issued on June 2, 1949, some three weeks after the action was instituted. Second, as no such overcharges as are mentioned in the *Haydell* case, were pleaded and proven, none could be awarded. Third, as we have shown in the preceding portions of this brief, the mere demanding or receiving of excessive rents by the landlord is not actionable under the statute. It is the violation of a refund order which is the actionable element that gives rise to authority to bring the suit.

Nor is this all. The rules of pleading and practice are designed to promote the righteous determination of a judicial proceeding, and in their application sight must not be lost of that purpose. (*Wangenheim v. Garner,* 42 C.A. 332, 336.) It has always been recognized as the right, if not always as the absolute duty, of a Court clothed with equitable jurisdiction, to apply its X-rays to all masks and covers and see through the real substance. (See *Loomis v. Callahan,* 196 Wisc. 518, 220 N.W. 816.)

We conclude this reply with the observation that, while much more could at this time be said, we do not feel that any useful purpose would be served by further discussing or specially criticizing the various arguments, illustrations, suggestions and innovations advanced by cross-complainant's counsel in its brief, nor that it is necessary to comment upon each of the several cases cited in it, further than that which has been done herein.

CONCLUSION.

It is respectfully submitted that all of the grounds, reasons and matters asserted and appearing herein for the reversal of the judgment appealed from, are duly authorized, raised and presented by the record on appeal, and are such as to require that the judgment of the Court below be corrected by this Court.

Appellants further and finally submit that the judgment of the Court below is one which, in matters affecting appellants' substantial rights, not the least of which are their right to the full and equal benefit of all laws and proceedings for the security of their person and property, has resulted in prejudicial error and a miscarriage of justice, and should be reversed and this cause remanded with such directions, the premises considered, as this Court may deem requisite.

Dated, San Francisco, California,
January 26, 1951.

Respectfully submitted,
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Attorney for Appellants.